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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Leiner Health Services Corp.

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Serial No. 76/096,248

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Michael A. Painter of Isaacman, Kaufman & Painter PC for Leiner Health Services Corp.

David E. Yontef, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

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Before Simms, Hanak and Rogers, Administrative Trademark Judges.

Opinion by Simms, Administrative Trademark Judge:

Leiner Health Services Corp. (applicant), a Delaware corporation, has appealed from the final refusal of the Trademark Examining Attorney to register the mark RELAXATION FORMULA ("FORMULA" disclaimed) for vitamins and dietary food supplements.[1] The Examining Attorney has refused registration under Section 2(d) of the Act, 15 USC

[1] Application Serial No. 76/096,248, filed June 24, 2000, based upon applicant's allegation of a bona fide intention to use the mark in commerce. Subsequently, applicant filed an amendment to allege use asserting first use on January 2, 2001.

§1052(d), on the basis of Registration No. 2,263,658, issued July 20, 1999, for the mark RELAXATION COMPLEX ("COMPLEX" disclaimed) for dietary and nutritional supplements. Applicant and the Examining Attorney have submitted briefs but no oral hearing was requested.

We affirm.

The Examining Attorney argues that the marks RELAXATION FORMULA and RELAXATION COMPLEX are similar in sound, appearance, connotation and commercial impression and that, when used with closely related goods, are likely to cause confusion. With respect to the marks, the Examining Attorney contends that, while descriptive and disclaimed matter cannot be ignored, one feature of a mark may be recognized as more significant in creating a commercial impression and that greater weight may be given to that dominant feature. Furthermore, the Examining Attorney argues that the first word of a composite mark is often dominant. In this case, the Examining Attorney maintains that the word RELAXATION is the dominant element of both applicant's and registrant's marks. Also, the Examining Attorney notes that the recollection of the average purchaser is imperfect and that he or she may only retain a general impression of a trademark.

Concerning the goods, the Examining Attorney argues that they are similar health-related food supplements which may be used together. Further, they may be sold in the same kinds of stores and may be advertised in health magazines and catalogs. Finally, the Examining Attorney asks us to resolve any doubt in favor of the registrant.

Applicant, on the other hand, argues that the respective marks must be compared in their entireties and that the disclaimers do not operate to remove any matter from the marks. It is the applicant's position that the word "RELAXATION" is suggestive of a feature or use of the goods of both parties in that the term suggests the effect of use (having a relaxing effect on the body). Thus, the term is, in applicant's view, "weak" and entitled to a limited scope of protection. Because of the inherent weakness of the common portion of the marks and the differences in the non-common portions of the marks, applicant argues that the respective marks are distinguishable and are not likely to cause confusion. In addition, in its brief, applicant for the first time has referred to a number of registrations of composite trademarks which include the word "RELAXATION" or

formatives thereof.[2] However, as the Examining Attorney has noted, no copies of any of the third-party registrations have been made of record by applicant. In any event, the Examining Attorney argues that these registrations are not evidence of public awareness thereof or of what happens in the marketplace, and that they are entitled to little weight on the issue of likelihood of confusion.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *In re E. I. du Pont de Nemours & Co.,* 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood-of-confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.,* 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). Also, in comparing marks, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entireties." *In re National Data Corp.,* 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Further, "[w]hen marks

[2] In its first response, applicant did refer to the registered mark PURE QUALITY RELAXATION covering nutritional supplements (Registration No. 2,082,331, issued July 22, 1997), over which the cited mark issued.

would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America,* 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992).

Upon careful consideration of this record and the arguments, we conclude that applicant's mark, when used in connection with goods substantially identical to those of registrant, is likely to cause confusion.

First, with respect to the marks, as noted, while disclaimed matter may not be ignored, it is not improper to give greater weight in the likelihood-of-confusion analysis to the more prominent origin-indicating feature of a mark. While these marks have some obvious differences in pronunciation and appearance as a result of the addition of a descriptive or generic ending to each mark, both marks begin with the more prominent word RELAXATION. While it may be true that this word is suggestive of a feature or characteristic of the goods, it is nevertheless not merely descriptive and is entitled to protection when its use in another mark will result in likelihood of confusion. The fact that the word RELAXATION is the first word in both marks increases its importance in creating a commercial impression, as argued by the Examining Attorney.

Applicant has not seriously contended that its vitamins and dietary food supplements are different from registrant's dietary and nutritional supplements. Indeed, we believe that these goods are substantially identical. They are likely to be sold in the same retail stores to the same class of ordinary purchasers. Furthermore, these goods are relatively inexpensive and purchasers may not, therefore, make their selection of these goods with much care. We believe that purchasers aware of registrant's RELAXATION COMPLEX dietary and nutritional supplements and who encounter applicant's RELAXATION FORMULA vitamins and food supplements, are likely to believe that all of these goods emanate from or are sponsored by the same source. If we had any doubt about this conclusion, that doubt must be resolved in favor of the prior user and registrant, in accordance with established precedent.

Decision: The refusal of registration is affirmed.